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No. 79-1269

IN THE

# Supreme Court of the United States

October Term, 1979

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INTERNAL REVENUE SERVICE, *Petitioner*

v.

SUSAN B. LONG and PHILIP H. LONG, *Respondents*

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## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## SUBJECT INDEX


*Page*

Respondents' Brief In Opposition ..... 1

Opinions Below ..... 1

Questions Presented ..... 2

Statement of Facts ..... 2

Argument ..... 7

1. The Question Stated In the Petition Is Not Presented By the Decisions of the Courts Below Or the Record ..... 7

   A. The Issues Stated In the Petition Were Neither Raised by the IRS Previously, Nor Addressed by the Courts Below ..... 7

   B. There Is Not Even a Scintilla of Evidence In the Record That Supports the Petition's Claim That Disclosure of TCMP Records Would Harm the Audit Selection Process ..... 9

   C. The District Court, Not This Court, Is the Forum In Which the IRS Can Try to Raise the New Claims Presented In the Petition for Certiorari ..... 11

2. Certiorari Should Be Denied Under Supreme Court Rule 23(4) Because the Petition Contains Many Inaccurate and Extrarecord Factual Assertions ..... 12

3. Neither Exemption 7(E) Nor Exemption 2 of the FOIA Projects the TCMP Policy Research Data Base Sought by Respondents ..... 13

   A. Exemption 7(E) Applies Only to Law Enforcement Records Compiled In the Course of a Specific Investigation, Not to Records of an Agency's Policy Research Program Such as the TCMP ..... 13

   B. Exemption 2 Covers Only Matters "Related Solely to Internal Personnel Rules and Practices", Not a Policy Research Program Such as the TCMP ..... 15

C. Even If the Service's Legal and Factual Arguments Concerning Exemptions 2 and 7(E) Were Correct, the Claims Do Not Apply to the TCMP Data At Issue Here, Since Current DIF Formulae Are Based on Subsequent Data Not Requested by the Longs ..... 16

Conclusion ..... 18

Appendices:

Appendix A ..... A-1

Appendix B ..... 1-3

## TABLES OF AUTHORITY

### Table of Cases

*Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970) ..... 7, 10, 11

*Church of Scientology v. U.S. Dep't of the Army*, 611 F.2d 738 (9th Cir. 1979) ..... 13, 14

*Cox v. Levi*, 592 F.2d 460 (8th Cir. 1979) ..... 14

*Cox v. United States Dep't of Justice*, 576 F.2d 1302 (8th Cir. 1978) ..... 14

*Dept. of the Air Force v. Rose*, 425 U.S. 352 (1976) ..... 15-16

*Hawkes v. Internal Revenue Service*, 507 F.2d 481 (6th Cir. 1974) ..... 7

*Helvering v. Minnesota Tea Co.*, 296 U.S. 378 (1935) ..... 7

*Jordan v. United States Department of Justice*, 591 F.2d 753 (D.C. Cir. 1978) ..... 7, 16

*Lawn v. United States*, 355 U.S. 339 (1958) ..... 9

*NLRB v. Sears*, 421 U.S. 132 (1975) ..... 7, 11

*Ramsey v. United Mine Workers*, 401 U.S. 302 (1971) 7

*Ryan v. Department of Justice*, ..... F.2d ..... (D.C. Cir. 1980) ..... 7

*Schley v. Pullman Car Co.*, 120 U.S. 575 (1887) ..... 9

*Sladek v. Bensinger*, 605 F.2d 899 (2d Cir. 1979) ..... 14



*United States v. First National Bank in Dallas*, 468 F. Supp. 415 (N.D. Texas 1979) ..... 15

*United States v. Flagg*, ..... F. Supp. ....., 45 A.F.T.R.2d 80-618 (S.D. Iowa 1979) ..... 15

*United States v. Lovasco*, 431 U.S. 783 (1977) ..... 9

*Zamnik v. Dep't of State*, No. 79-1072 (D.D.C. 1979) .. 14

### Statutes

5 U.S.C. §552(b)(2) ..... 15

5 U.S.C. §552(b)(7) ..... 13

26 U.S.C. §6103 ..... 8, 9

26 U.S.C. §7602 ..... 15

### Other Authority

ABA Code of Professional Responsibility, DR 7-106(c), (1), (3), (4) ..... 10

*Att'y Gen. 1974 FOI Amdts. Mem.* (Feb. 1975) ..... 14

Civil Rule 11 ..... 10

Civil Rule 56 ..... 10

General Accounting Office, *How the Internal Revenue Service Selects Individual Income Tax Returns for Audit*, Report No. GGD-76-55 (Nov. 5, 1976) ..... 6, 15

IRM §125(18) ..... 3, 5, 14

IRM §125(18).1 ..... 3, 13

IRM §125(18).2 ..... 3, 4

IRM §4861.2 ..... 4, 13

IRM Supp. 14RDD-4 (July 2, 1962) ..... 3, 13

Senate Rep. No. 813, 89th Cong., 2d Sess. 8 (1965) ..... 15

Supreme Court Rule 23(4) ..... 12, 13

32 *Tax Lawyer* 687 (1979) ..... 3

*TCMP Handbook*, IRS Document 6457 (Sept. 1977) ..... 17

*Wall Street Journal*, Feb. 5, 1975 ..... 2

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### RESPONDENTS' BRIEF IN OPPOSITION

Respondents oppose both the grant of a writ of certiorari and the summary action requested by Petitioner. Certiorari should be denied because the question stated in the Petition is neither presented by the decisions below nor the record and, since there is no final judgment by the district court, the petition is premature.

### OPINIONS BELOW

The district court's unreported order is Appendix A to the Petition. The opinion of the Ninth Circuit vacating the district court's order (App. B to Petition) is reported at 596 F.2d 362.

## QUESTIONS PRESENTED

Because the relief requested of this Court by Petitioner (Pet., p. 18) is inconsistent with its statement of the question (p. 2), the question presented must be restated as follows:

Should this Court, before final judgment in a case currently pending in the district court, intervene to require the lower court to consider two alleged defenses to disclosure of certain Internal Revenue Service records under the Freedom of Information Act (exemptions 2 and 7(E)), when the IRS has never asked the lower courts to consider them, the defenses have no record support and the lower courts have never addressed the defenses?

## STATEMENT OF FACTS

Because the petition ignores many important facts, distorts record evidence on essential points and contains over two pages of extrarecord factual fabrications (Pet., pp. 9-12), Respondents are compelled to submit this counterstatement of the facts.

Susan Long is a doctoral candidate in sociology writing a dissertation on the factors which determine the level of voluntary compliance with the tax laws. V R. 1485-87.[1] Both Susan and Philip Long have studied IRS administrative practices for several years, and their research has won them praise from many sources. III R. 582, 607-18. For example, the Feb. 5, 1975, *Wall Street Journal* stated (III R. 582):

> No one has done more to force public disclosure of the IRS audit policies and practices than Phil and Sue Long.

1. This record reference is to volume V of the record, page 1485. A copy of six-volume record was submitted to the Court by Petitioner.



The Longs were responsible for the release of major portions of the Service's Internal Revenue Manual to the public. *Long v. Internal Revenue Service,* 349 F.Supp. 871 (W.D. Wa. 1972). The Manual has proved to be of great value to tax practitioners. *See generally* A. Parnell, "The Internal Revenue Manual: Its Utility and Legal Effect," 32 *Tax Lawyer* 687 (1979).

The records sought by the Longs in this case contain part of the scientific data base compiled in the Service's Taxpayer Compliance Measurement Program (TCMP), the IRS research program which compiles data to answer fundamental tax policy questions concerning such matters as long range goals, appropriation requests and proposals for changes in the tax laws. Internal Revenue Manual (IRM) §125(18);[2] III R. 668-70. According to the IRS, the TCMP was established in 1962 as "a scientific research system" to provide a data base for long range planning of tax administration and policy. I R. 21-22; III R. 668-70; IRM §§125(18), 4861.1; IRM Supp. 14RDD-4 (July 2, 1962).[3] The purposes of the TCMP are summarized in IRM §125(18).1 (App. A. *infra,* la):

> (1) The Taxpayer Compliance Measurement Program (TCMP) is the Service's long-range research program designed to provide measurements of total workload and its major characteristics so that alternative applications of its limited resources can be evaluated.

2. The Internal Revenue Manual is the IRS policy and procedure manual. It contains guidelines and directives governing agency employees. The text of IRM §125(18) .1 and .2, which describe the TCMP, is in Appendix A to this brief.

3. IRM Supp. 14RDD-4, dated July 2, 1962, established the Taxpayer Compliance Measurement Program. The text of this IRS directive, containing a description of the program and its purposes, is set forth in Appendix B to this brief.

> (2) In addition to measuring levels of compliance and changes therein, the data produced under TCMP will be used to improve the efficiency and effectiveness of existing operations in terms of such matters as allocations of manpower, taxpayer education programs, tax laws, tax return forms and instructions, budget requests, and general tax administration policy and systems.***

See also I R. 21-22; III R. 668-70.

A number of TCMP surveys have been conducted since the program was initiated in 1962, covering at least seven different types of taxes (individual, corporate, estate, etc.). Surveys of particular types of taxpayers are called "phases," and, if the survey is repeated, each specific survey year is termed a "cycle." I R. 20; III R. 668; IRM §4861.2. The Longs are not seeking data from all TCMP phases and cycles; they seek only the data compiled in Phase II (businesses that did not file returns) and early cycles of Phase III (individual returns) and Phase IV (small corporation returns). I R. 20.

A TCMP survey consists of the following steps:

1. A random sample of a specific type of returns is chosen by tax identification number (or, in the case of Phase II, a random sample of businesses that did not file returns and of geographic areas was selected) (I R. 21-22). The sample is subjected to intensive audits (I R. 669).

2. The taxpayers' reported figures and corrected figures from the audits are entered on computer data tapes (I R. 23; III R. 622).

3. Data on the computer tapes is statistically weighted to estimate for each class of taxpayers the total potential tax change if all returns were examined. The total tax



change is added to total tax reported to determine total tax liability for each class of taxpayers. The percentage of total tax liability that is reported is the "voluntary compliance level" for the class (III R. 669).

The IRS uses the data to evaluate and make changes in its operational and budgetary policies, such as by requesting appropriations for additional auditors. III R. 669; IRM §125(18). Because the TCMP samples can be used to represent the entire population, the TCMP data base is used for research and policy planning purposes by organizational units throughout IRS. III R. 669-70. Accordingly, the Ninth Circuit recognized that "information from the TCMP is extremely useful in formulating tax policy and in evaluating current practices." 596 F.2d at 369; Pet., App. B 42a.

Because the petition for certiorari deliberately confuses TCMP with an entirely separate audit selection program (Pet., pp. 3, 8-12), it is necessary that this statement of facts include a short discussion of something this case is *not* about—the discriminant function (DIF) scoring system.[4] Discriminant function analyisis is a mathematical technique used to determine how much weight should be given different variables in statistical data for classification purposes. III R. 765. The IRS applies the DIF technique to various taxpayer reporting characteristics to determine which variables on a tax return correspond to a higher likelihood of finding a significant tax change if the return is audited. III R. 765-66. Because the TCMP data base includes a scientifically selected random sam-

4. In contrast to its confusion of the TCMP with DIF in this Court, the IRS insisted in the district court that the development and updating "of DIF formulas is not a TCMP project or study." III R. 766.

ple of taxpayers, portions of the TCMP data can be used to represent charactistics of taxpayer classes as if all returns in the class were selected for audit. III R. 766. Some of this data, but not all,[5] is used to develop DIF formulae. *Id.* According to the IRS, the TCMP data base is not necessary for this purpose. The affidavit of James Swartzwelder, IRS planning officer, states, "the TCMP data base . . . is the best but not the only base available to the Internal Revenue Service for use in developing DIF formulas." *Id.*[6]

The formulae developed through discriminant function analyses are ultilized in a computerized scoring process which aids IRS personnel in classifying income tax returns. General Accounting Office, *How the Internal Revenue Service Selects Individual Income Tax Returns for Audit*, Report No. GGD-76-55 (Nov. 5, 1976) pp. 15-16, 19-20.[7] The DIF scoring system is not a substitute for the manual screening of returns by classifiers, but is simply an aid in screening returns efficiently and inexpensively. *Id.* at 16, 30-31. In the end, the effectiveness of the audit selection process depends on the judgment and experience of IRS return classifiers. *Id.* at 16, 19-20, 24. Since the return

5. For example, Phase II was a study of businesses that did not file tax returns. Accordingly, no formula based on Phase II data could conceivably be developed to select returns for audit. III R. 766. The Longs are seeking Phase II data in this action.

6. These facts concerning DIF are taken exclusively from an affidavit submitted to the district court by the IRS. Although the affidavit contains a detailed description of the DIF scoring system, there is no mention whatsoever of any harm to the DIF system if the TCMP data base were disclosed. In fact, the entire emphasis of the IRS affidavit was to show that DIF was not related to the TCMP.

7. Because the IRS has inaccurately described DIF in the petition and added new claims of harm without record support, it is necessary for Respondents to stray slightly from the record to explain what DIF really is. Respondents will provide citations to published sources of which the Court may take notice.



classifiers' role is the most important part of the audit selection process, it is noteworthy that the classifiers' instructions for selecting returns for audit have already been disclosed by the IRS in accordance with the decision of the Sixth Circuit in *Hawkes v. Internal Revenue Service*, 507 F.2d 481 (6th Cir. 1974). The *Hawkes* court rejected an argument similar to the one made by the IRS here. 507 F.2d at 484-85.

## ARGUMENT

### 1. The Question Stated In the Petition Is Not Presented By The Decisions Of The Courts Below Or The Record.

#### A. *The Issues Stated in the Petition Were Neither Raised by the IRS Previously, Nor Addressed by the Courts Below.*

This Court normally declines to consider arguments not previously raised by a party and not considered by the lower courts. *Helvering v. Minnesota Tea Co.*, 296 U.S. 378, 380 (1935); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Ramsey v. United Mine Workers*, 401 U.S. 302, 312 (1971). Thus, the Court refused to consider the possible application of exemption two of the Freedom of Information Act (FOIA) to certain agency records where the government had failed to raise the issue in the lower courts. *NLRB v. Sears*, 421 U.S. 132, 165 (1975). *See also Jordan v. United States Department of Justice*, 591 F.2d 753, 779 (D.C. Cir. 1978) (en banc) (The court refused to consider an agency's claim that exemption 7 of the FOIA protected certain records where the defense was first raised one month before oral argument.); *Ryan v. Department of Justice*, ..... F.2d ....., No. 79-1777 (D.C. Cir. 1980) slip opinion 19 n.38a (An

agency must raise an exemption "by identifying it at the district court level *and by demonstrating that the exemption applies to the documents in question.*" Emphasis in original.)

The only question stated in the Petition (p. 2) is whether IRS records containing a portion of the TCMP data base are exempt from disclosure under FOIA exemption 2 or 7. As the IRS concedes (Pet., pp. 15, 18), neither exemption has ever been claimed by the IRS before, in either the district court or the Ninth Circuit, and, consequently, neither court addressed these issues. In oral argument before the Ninth Circuit, counsel for the IRS was expressly asked whether release of TCMP data would harm law enforcement. Counsel replied that the issue had been specifically considered, but it was decided that the argument would not be raised. He also conceded that there was no record support for an argument that release of the TCMP data would harm law enforcement. Consequently, in its opinion the Ninth Circuit noted that the IRS had not claimed exemption 7 or any other exemptions except exemption 3 and 26 U.S.C. §6103.[8] 596 F.2d at 368 n.6; Pet., App. B, p. 41a.

The IRS claims (Pet., p. 14) that it "squarely presented" its new arguments in its petition for rehearing in the Ninth Circuit. However, that petition did not claim exemptions 2 or 7, but simply reiterated the legal argument that 26

8. In its petition, the IRS attempts to excuse its failure to raise its current claims in the lower courts because the availability of its argument under 26 U.S.C. §6103 appeared to make it unnecessary. Pet., pp. 13-14. However, the §6103 argument depended on a reading of the statute that was directly at odds with its language. See Petition at 13. Accordingly, it is very difficult to believe that the IRS was so certain of victory with its §6103 arguments that it could simply forget about other valid arguments.



U.S.C. §6103 barred disclosure. Some new factual points about DIF and harm caused by release were stated, but when Respondents moved to strike these false statements of fact without record support, the IRS insisted that its DIF argument was not new, "but instead is based on information contained within the existing record."[9] The Ninth Circuit then reviewed the record and found no support for the assertions about DIF. Pet., App. C, p. 46a. Accordingly, it held that the IRS had failed to properly raise the factual claim in the district court and denied the petition for rehearing. *Id.*

This Court normally will not consider arguments that were not squarely raised below. *United States v. Lovasco,* 431 U.S. 783, 789 n.7 (1977). In this case, the IRS never claimed exemptions 2 and 7 before the petition for certiorari. (Even the Solicitor General's application for extention of time to file the petition for certiorari stated that the question presented is the applicability of 26 U.S.C. §6103.) Accordingly, certiorari should be denied.

### B. *There Is Not Even A Scintilla of Evidence in the Record That Supports the Petition's Claim That Disclosure of TCMP Records Would Harm The Audit Selection Process.*

A fundamental principle of appellate review is that it must be conducted on the basis of the record, without consideration of extrarecord factual assertions in briefs or arguments. *Schley v. Pullman Car Co.,* 120 U.S. 575, 578 (1887); *Lawn v. United States,* 355 U.S. 339, 354 (1958). In spite of this rule, the petition for certiorari is replete

9. Appellee's memorandum in opposition to Appellants motion to strike, p. 2. A copy of this memorandum has been lodged with the Clerk.

with references to alleged facts that are not in the record (Pet., pp. 3-4 and 9-12).

The Ninth Circuit correctly noted in its order denying rehearing (Pet., App. C, p. 46a), that the IRS has no record support for its claim that disclosure of TCMP data would harm its law enforcement function by revealing DIF formulae used in the audit selection process. The only record reference to these matters is vague speculation in a supplemental memorandum by an attorney for IRS who suggests, without any explanation or record support (III R. 647):

> although the exact DIF system utilized by the Internal Revenue Service might not be duplicated, an individual with knowledge of how a DIF system is developed *could gain insight into the Internal Revenue Service's overall tax strategy.* As a result, the Internal Revenue Service's *efforts to administer the Internal Revenue laws could be severely hampered.* (Emphasis added.)

Similar speculation is found at two other places in this memorandum (III R. 638, 646). This unsupported speculation by counsel is the only point in the record cited in the petition for certiorari to support the factual assertions concerning harm allegedly caused by disclosure of the TCMP (Pet., p. 12).

Counsel's speculation in the supplemental memorandum is not evidence. It is not sworn and hence not admissible, and may not be considered by a court. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157-58 n. 16 and 17 (1970); Civil Rule 56. Moreover, counsel's factual assertions without any evidentiary support violate the rules of professional conduct. ABA Code of Professional Responsibility, DR 7-106(c) (1), (3) and (4); *see* Civil Rule 11.



Even if counsel's statement were admissible evidence, it contained only the speculative conclusion that knowledge of DIF formulae "could" allow a person to "gain insight into the Internal Revenue Service's overall tax strategy." II R. 647. This is very different from the current claims of the IRS in its petition.

Since the arguments in the petition are wholly lacking in *any* support by evidence in the record, certiorari should be denied.

### C. *The District Court, Not this Court, Is the Forum In Which the IRS Can Try to Raise the New Claims Presented in the Petition for Certiorari.*

The IRS has chosen the wrong forum to initially seek the relief requested—leave to make an untimely claim of new defenses. As the Court noted in *NLRB v. Sears*, 421 U.S. 132, 165 n.30 (1975), the lower courts, not the Supreme Court, should decide in the first instance whether an agency can claim a new FOIA exemption after an appeal, when it failed to originally claim the exemption in the district court. This follows from the general rule that this Court does not review issues that are not presented by the record. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 n.16 (1970).

By seeking leave to claim new defenses in this Court, rather than in the district court, the IRS is attempting to evade consideration of several important issues which should be resolved before granting such extraordinary equitable relief. The lower court should decide (1) whether the agency's conduct throughout the proceedings forecloses it from making its new claims; (2) whether the failure of the IRS to claim exemptions 2 and 7(E) pre-

viously, although the arguments were known to the IRS, is a waiver of the exemptions; (3) whether the Ninth Circuit remand forecloses any new defenses; (4) whether the Longs would be prejudiced by permitting the IRS to raise new defenses; and (5) whether the IRS has provided a sufficient offer of proof, with record evidence, to demonstrate that the newly claimed exemptions would apply. These issues require an extensive review of the record and consideration of new factual submissions, a role for which the district court, not this Court, is suited.

If, after considering these matters, the district court enters a final judgment requiring disclosure of the TCMP data, the IRS could appeal on the trial court record. If the Ninth Circuit then denies relief, the IRS could petition for certiorari and the Court would have a record upon which it could make an informed decision. Accordingly, the petition for certiorari is premature and should be denied.

**2. Certiorari Should Be Denied Under Supreme Court Rule 23(4) Because the Petition Contains Many Inaccurate and Extrarecord Factual Assertions.**

Supreme Court Rule 23(4) states that it is a sufficient reason for denying review if the petitioner fails "to present with accuracy . . . whatever is essential to a ready and adequate understanding of the points requiring consideration . . ." Under this rule certiorari should be denied in the instant case because the IRS petition is based on inaccurate and extrarecord factual assertions.

Pages 3-4 and 8-12 of the petition contain numerous inaccurate factual assertions. As noted in Respondents' counterstatement of the facts, the Petition deliberately confuses the TCMP with an entirely separate program, the discriminant function component of the audit selection



process. For example, the IRS states that the TCMP is an "investigative technique" designed to select tax returns for audit. Pet., pp. 3, 9-12. This is false, since the TCMP records sought by the Longs simply contain a collection of facts (statistical data collected in TCMP surveys) that is used as a scientific data base for policy research purposes. III R. 668-70; IRM §125(18).1 (App. A), §4861.1; IRM Supp. 14RDD-4 (App. B). In addition, the petition contains many extrarecord factual assertions concerning harm to law enforcement that would allegedly be caused by disclosure of the TCMP data base (Pet., pp. 8-12).

Since the legal arguments in the petition for certiorari are dependent upon these inaccurate and extrarecord factual assertions, certiorari should be denied under Rule 23(4).

**3. Neither Exemption 7(E) Nor Exemption 2 of the FOIA Protects the TCMP Policy Research Data Base Sought by Respondents.**

***A. Exemption 7(E) Applies Only to Law Enforcement Records Compiled in the Course of A Specific Investigation, Not to Records of An Agency's Policy Research Program Such As the TCMP.***

Exemption 7 of the FOIA covers "investigatory records compiled for law enforcement purposes" if the agency can demonstrate that disclosure would cause one of several specified types of harm (5 U.S.C. §552(b)(7)). Hence, the initial inquiry under exemption 7 is whether the records at issue are "law enforcement" records. The Ninth Circuit stated an appropriate test for determining whether particular documents are "law enforcement" records in *Church of Scientology v. U.S. Dep't of the Army*, 611 F.2d 738 (9th Cir. 1979). The court said (at 748):

> In determining whether a "law enforcement purpose" is present, courts must look to the purpose behind the compilation of the document and determine whether the investigation has centered upon the suspected commission of specific illegal acts. * * * Generally, files such as "internal audits" compiled simply to determine whether an agency's internal operations comport with statute or regulations do not qualify.

The Justice Department has recognized this initial requirement. The *Att'y Gen. 1974 FOI Amdts. Mem.* (Feb. 1975) stated (at 6) that "[r]ecords generated for such purposes as determining the need for new regulations or preparing statistical reports are not 'for law enforcement purposes'."

Even if records are created as part of a law enforcement function, exemption 7 does not apply unless the documents are "investigatory records compiled in the course of a specific investigation." *Cox v. United States Dep't of Justice,* 576 F.2d 1302, 1310 (8th Cir. 1978); *Cox v. Levi,* 592 F.2d 460, 462 (8th Cir. 1979); *Sladek v. Bensinger,* 605 F.2d 899, 903 (2d Cir. 1979); *Church of Scientology v. United States Dep't of the Army,* 611 F.2d 738, 748 (9th Cir. 1979).[10]

The TCMP data at issue in this case does not meet even one of the elements of exemption 7(E). The TCMP is not a law enforcement activity, but a policy research program. III R. 668-70; IRM §125(18) (App. A). TCMP was initiated to provide a statistical data base which can be used

10. The only case cited in the petition (p. 15) for its contrary view that exemption 7(E) covers records that are not compiled in a specific law enforcement investigation is an unreported district court case, *Zamnik v. Dep't of State,* No. 79-1072 (D.D.C., Aug. 28, 1979). The *Zamnik* case is without precedential value because it was brought by a *pro se* plaintiff (apparently a drug addict) who failed to brief the exemption 7(E) issue. The district court's memorandum order contains no discussion of the coverage of exemption 7(E), only a conclusion.



to measure the efficiency of IRS operations, plan general tax administration strategy, propose changes in tax laws and support budget requests. *Id. See also* 1976 General Accounting Office report, *supra,* at 58-60. Lower courts that have inquired into the nature of the TCMP have found that it is not a law enforcement program. *United States v. Flagg,* ..... F. Supp. ....., 45 A.F.T.R.2d 80-618 (S.D. Iowa 1979); *United States v. First National Bank in Dallas,* 468 F. Supp. 415, 417 (N.D. Texas 1979). In each of these cases, the district court refused to enforce an IRS administrative summons under 26 U.S.C. §7602 for a TCMP audit because the summons was issued for a research, not an investigative purpose.

Because the TCMP is not a law enforcement program, but a data base for policy research studies, the Service's claim that the records fall within FOIA exemption 7(E) is without merit.

### B. *Exemption 2 Covers Only Matters "Related Solely to Internal Personnel Rules and Practices," Not A Policy Research Program Such As the TCMP.*

The Service's assertion that "there is a strong basis for the applicability of Exemption 2 to the TCMP" records at issue (Pet., p. 17), ignores both the language of exemption 2 and the rules stated in the decisions cited. Exemption 2 refers to "matters that are . . . related solely to the internal personnel rules and practices of an agency" (5 U.S.C. §552(b)(2). TCMP data is certainly not "related solely" to the agency's "internal personnel rules and practices," since it is nothing like the sort of trivial personnel matters (lunch hours, sick leave usage, etc.) that Congress intended that the exemption should cover. Senate Rep. No. 813, 89th Cong., 2d Sess. 8 (1965); *Dept. of the Air Force*

*v. Rose*, 425 U.S. 352, 366-67 (1976); *Jordan v. United States Dep't of Justice*, 591 F.2d 753, 763-71 (D.C. Cir. 1978) (en banc).

Even if exemption 2 were extended as the IRS proposes (Pet., p. 17), beyond what Congress intended, the Service's claim depends upon a showing that records containing TCMP statistical data are a "law enforcement manual," the disclosure of which would "significantly assist those engaged in criminal activity." The fact is that the TCMP data base is not a manual or set of personnel instruction or rules—law enforcement or otherwise. Moreover, there is no evidence to support the claim that release of TCMP data would enable anyone to commit a crime. The agency's exemption 2 claim is thus without merit.

### C. *Even if the Service's Legal and Factual Arguments Concerning Exemptions 2 and 7(E) Were Correct, the Claims Do Not Apply to the TCMP Data At Issue Here, Since Current DIF Formulae Are Based on Subsequent Data Not Requested by the Longs.*

Finally, even if the Service's new claims concerning harm caused by disclosure of DIF formulae were true and exemption 2 or 7(E) covered such records, the claims do not apply to the TCMP data at issue here, since current DIF formulae are based on subsequent data not requested by the Longs.

The case only concerns data from Phase II of the TCMP and early cycles of Phase III (individuals) and Phase IV (small corporations), I R. 20. Phase II was a survey of delinquent businesses that failed to file tax returns and, consequently, it has nothing to do with selecting returns for audit, with DIF formulae or otherwise. I R. 21-22; III R. 766. DIF formulae have been developed with data from



certain Phase III and Phase IV cycles, but they must be updated every three years to compensate for changes in (1) tax laws, regulations and interpretations; (2) filing patterns; (3) reporting characteristics; and (4) economic factors. III R. 766; *TCMP Handbook*, IRS Document 6457 (Sept. 1977) p. III-3, V. Since DIF formulae are changed every three years as new TCMP cycles are completed (*id.*), the cycles of Phases III and IV at issue here, 1974 returns at the latest (I R. 20), were not used to develop the current DIF formulae.[11] *TCMP Handbook, supra.*

Since the specific TCMP data at issue here are not the data utilized in developing the current DIF formulae, the Service's arguments to this Court are inapplicable. Therefore, even if the arguments in the petition had some merit, they do not apply to this case.

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11. It appears that 1979 individual returns will be processed utilizing DIF formulae developed with the use of Phase III, Cycle 5 data, but these returns must be filed by April 15, 1980. 1980 returns will be processed in 1981 with the use of DIF formulae changed on the basis of data from Cycle 6. *TCMP Handbook*, p. III-3. The Longs do not seek Cycle 6 data in this case.

## CONCLUSION

The question stated in the petition was neither raised nor addressed in the courts below, and it is not presented by the record. The Service's arguments are dependent upon extrarecord factual assertions. Instead of making new claims in this Court, the IRS should ask the district court, which has never issued a final judgment ordering disclosure, for leave to raise new defenses. If the IRS is dissatisfied with the district court's action, it can appeal the final judgment. Then, if this Court eventually considers the case, there will be a record on which to make an informed decision. The petition for certiorari should be denied.

If the Court does grant certiorari, oral argument should be heard before decision so that the Court may explore the true facts of this case and the extrarecord claims by the IRS.

Respectfully submitted,

STEPHEN K. STRONG
*Counsel for Respondents*

April 1, 1980



## APPENDIX A

### INTERNAL REVENUE MANUAL §125(18)

Taxpayer Compliance Measurement Program (TCMP)

125(18).1
Description of Program

(1) The Taxpayer Compliance Measurement Program (TCMP) is the Service's long-range research program designed to provide measurements of total workload and its major characteristics so that alternative applications of its limited resources can be evaluated.

(2) In addition to measuring levels of compliance and changes therein, the data produced under TCMP will be used to impove the efficiency and effectiveness of existing operations in terms of such matters as allocations of manpower, taxpayer education programs, tax laws, tax return forms and instructions, budget requests, and general tax administration policy and systems. Insofar as practicable, both the direct enforcement results and the indirect effects on the level of voluntary compliance shall be established and used in program evaluations and improvements. In these determinations, full use will be made of advanced analysis techniques, such as those employed in "operations research."

125(18).2
Specific Objectives of TCMP within the Enforcement Areas

(1) In the delinquent accounts area the program will furnish information to estimate the extent of and the reasons for delinquencies in payment, and the response obtained upon issuance of notices, by types of tax and by taxpayer groups. This information will be used to define and measure compliance levels in tax payment delinquencies, and changes therein from period to period, to identify taxpayer groups in which efforts to prevent delinguency should be concentrated; to improve collection procedures; and to study the relationships between tax payment delinquencies and economic indicators and to improve the forecosts of delinquent accounts workloads.

(2) In the delinquent returns area, canvassing in sample geographical areas will be utilized to estimate the extent and tax significance of delinquencies which exist in the filing of tax returns in order to measure levels and changes: to test the completeness of the Automatic Data Processing (ADP) Master file in terms of its coverage of business taxpayers, identification of the kinds of taxes for which they are required to file returns, and the tax significance of delinquencies not identified by ADP to determine the characteristics association with nonfiling, for use both in efforts to increase voluntary compliance and to improve enforcement procedures for securing delinquent returns.

(3) In the returns-filed area, thorough examination of designated samples of different types of returns filed, will provide the basis for estimating the total number of erroneous returns filed and the tax significance of these errors. Continuation of the program will make it possible to measure the changes in these dimensions. The information obtained will be used to make improvements in selection and examination procedures.



## APPENDIX B

### INTERNAL REVENUE MANUAL SUPPLEMENT 14RDD-4

July 2, 1962

Taxpayer Compliance Measurement Program

*Section 1. Purpose*

.01 This Supplement establishes the Taxpayer Compliance Measurement Program and provides the general guidelines under which the program plans will be developed and carried out.

.02 The general purpose is to integrate into one Reports System all essential information needed to optimize Federal tax administration.

.03 This includes bringing together and coordinating into one comprehensive system all information required to measure the dimensions of Federal tax administration workloads, their trends and projections; the related requirements, such as manpower, training, equipment and buildings; and the basic economics involved, such as costs, direct and indirect tax yields, and improvements in existing cost-yield ratios.

*Section 2. Program Objectives*

.01 In general, the program will measure in a coordinated and scientific manner:

(1) The size and nature of the total tax administration workload;

(2) the portion of the tax administration job that is accounted for by current operations;

(3) the portion of the tax administration job that is left undone, or the tax administration gap;

(4) the level of taxpayer compliance;

(5) changes in the level of taxpayer compliance, and whether compliance is increasing or decreasing under existing programs;

(6) the effectiveness with which current operations are being conducted; and,

(7) the portion of the tax administration gap that is worth closing.

.02 These measurements require three kinds of information:

(1) That existing essential information and related reports, and pending additions thereto, be reviewed and amended as soon as practicable to attain TCMP objectives;

(2) that new information requiring taxpayer contacts be obtained to complete the reporting system (especially to fill in on reasons for delinquent accounts, unknown return-filing delinquencies, and tax errors on timely filed and delinquent returns); and,

(3) that, wherever useful and practical, the measurements shall be made by advanced analysis techniques, such as those employed in "operations research"; and, to this end, new kinds of technicians shall be added who are professionally trained to do such advanced analyses.

.03 In general, all proposals for new TCMP information requiring either important direct costs to obtain, or likely to result in significant reductions in tax collections or additional taxes produced, shall be cleared with the Commissioner both as to the effective dates and general timing of the proposals, and as to the costs and tax yields involved. Also, after adoption, the continued collection of such information shall be periodically reviewed as to direct costs and tax yields involved in relation to benefits obtained, and recommendations shall be made to the Commissioner respecting their continuance.

.04 In the delinquent accounts area the program will furnish information to estimate the extent of and the reasons for delinquencies in payment, and the response obtained upon issuance of notices, by types of tax and by taxpayer groups. This information will be used to define and measure compliance levels in tax payment delinquencies, and changes therein from year to year; to identify taxpayer groups in which efforts to prevent delinquency should be concentrated; to impove collection procedures; and to study the relationships between tax payment delinquencies and economic indicators with a view to establishing the normal rates of delinquency by various taxpayer groups so as to determine whether the compliance levels are above or below normal, and to improve the forecasts of delinquent accounts workloads.



.05 In the delinquent returns area, canvassing in sample geographical areas will be utilized to estimate the extent and tax significance of delinquencies which exist in the filing of tax returns in order to measure the level of noncompliance and the changes therein from year to year; to test the completeness of the ADP Master File in terms of its coverage of business taxpayers, identification of the kinds of taxes for which they are required to file returns, and the tax significance of delinquencies not identified by ADP to determine the taxpayer group-identification characteristics associated with nonfiling, for use both in efforts to increase voluntary compliance and to improve enforcement procedures for securing delinquent returns.

.06 In the returns-filed area, thorough examinations of designated samples of returns filed will provide the basis for estimating the total number of erroneous returns filed and the tax significance of these errors. Continuation of the program will make it possible to measure the changes in these dimensions and thus determine whether the level of compliance in returns filed is increasing or decreasing. The information obtained will include the characteristics of taxpayers filing erroneous returns and the detailed nature of the tax errors, by types and sizes of tax errors, by designated issues, and will be used to make improvements in selection and examination procedures.

.07 In addition to measuring levels of compliance and changes therein, the data produced under TCMP will be used to improve the efficiency and effectiveness of existing operations in terms of such matters as improved allocations of manpower, taxpayer education programs, tax laws, tax return forms and instructions, and general tax administration policy and systems. The data also will be used to

help establish the portions of the tax administration gaps that are worth closing. Insofar as practiciable, both the direct tax results and the indirect effects on the level of voluntary compliance shall be established and used in program evaluations and improvements. In these determinations, full use should be made of advanced analysis techniques, such as those employed in "operations research."

*Section 3. Development of Plans, Coordination of Program, and Standards of Performance*

.01 The Office of Planning and Research will be primarily responsible for developing the TCMP plans, and for the overall measurements and analyses under Section 2.

.02 All other offices, including the Reports Division, will be primarily responsible for implementing the TCMP plans in their areas of responsibility, and for the detailed analyses leading to improvements in the Service's operations as generally outlined under Section 2. Existing functional responsibilities will be maintained under TCMP.

.03 The Service will place considerable dependence on the results of TCMP for the justification of existing programs and the needed changes therein to achieve improvements; and, for the determinations of the portions of tax administration gaps that can be economically closed. Consequently, the raw data produced and the analytical methods used must be of professional quality so as to establish confidence in and avoid controversy over the adequacy of the TCMP results. The following standards indicate the kind of quality desired and the areas to be controlled:

(1) If resources are available, sampling errors should be kept within limits of 5 to 10 percent at the national level for major groups of taxpayers whose compliance levels are to be measured over a long period of time.

(2) Systemic errors resulting from inadequate instructions, or instructions that have not been fully complied with by the various operating levels of the Service, must be kept to a mini-



mum by adequate indoctrination, monitoring, and nonacceptance (where feasible) of incorrect data and reports.

(3) Care must be exercised to minimize changes in reporting definitions and requirements so as to maintain a high internal consistency in the data produced over the years.

(4) The quality and intensity of enforcement activities required for TCMP must be carefully defined to permit reasonable consistency in the results of investigations and examinations over the years.

*Section 4. Implementation*

No action is required by field offices at this time. Specific plans and instructions will be subsequently issued in the form of manual supplements in each of the functional areas involved.

/s/ BERTRAND HARDING
*Acting Commissioner*